IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.2050 OF 2005

IN

L.C.SUIT NO.7342 OF 1998

ALONG WITH

CIVIL APPLICATION NO.4585 OF 2005

Kantilal Damji Gada ...Appellant

Versus

The Municipal Corporation of

Greater Mumbai & Ors. ...Respondents

.....

Ms.Asha Bhambani i/b Mahesh Shah & Co. for Appellant.

Mr.Xavier for Respondent No.1.

Mr.P.S.Dani i/b Pandya Gandhi & Co. for

Respondents 2 to 5.

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CORAM: A.M.KHANWILKAR, J.

FEBRUARY 1, 2006.

P.C.

1. Heard Counsel for the parties. Perused the relevant record produced before me.

2. In my opinion, no fault can be found with the view taken by the Court below that there is no evidence to support the stand that the suit structure was in existence prior to the datum line i.e. 1st April 1962. Counsel for the Appellant vehemently argued that there was ample evidence on record to support that position. The first document which is pressed into service is the Judgment of the Small Causes Court rendered in Ejectment Application No.392/E/1975 dated October 10, 1984. Reliance was placed on the findings returned in the Judgment of the Small Causes Court dated 10th October 1984 to contend that at more than one place it is noted by the Trial Judge on the basis of evidence led in that case that the suit premises are in existence since prior to 1961. It is contended that the said proceedings were between the landlord and the erstwhile tenant from whom the Appellant has succeeded.

3. The argument seems to be attractive. However, it clearly overlooks the fact that the suit premises referred to in the Ejectment

proceedings before the Small Causes Court has been described as Tin Shed No.8 on the ground floor near Padhye Wadi Chawl, W.C. 21 E, Padhye Wadi, Bhavani Shankar Road, Dadar, Mumbai - 400 028. Whereas, the proposed action of Respondent Corporation is in respect of suit structure described as R/27/B, ground floor, Padhyewadi Chawl, Bhavani Shankar Road, Dadar, Mumbai - 400 028.

4. There is absolutely no pleading that the structure which was described as Shed No.8 was later on changed or renumbered as Room No.27/B which is the suit structure. No evidence has been adduced by the Appellant in support of that stand, which is pressed into service before this Court across the bar. If it is so, no fault can be found with the conclusion reached by the Court below that the Appellant/Plaintiff has failed to prove that the structure referred to in the Ejectment proceedings being Shed No.8 is the same structure which is the subject matter of the present Suit being Room No.27/B on the ground floor. In absence thereof, the decision of the Small Causes Court which is strongly pressed into service will be of

no avail to the Appellant.

5. To get over this position, Counsel for the Appellant relies on the reply sent on behalf of the Appellant by the Advocate which has been exhibited in the present proceedings. Indeed, the said reply sent by the Advocate makes reference to the change in the numbering of the structure. However, such a case is not specifically made out in the Plaint or any attempt made to adduce evidence to support that position. Some stand taken in the legal reply sent on behalf of the Appellant cannot be the basis to record finding of fact in favour of the Appellant on the relevant matter. That can be done only if such a specific stand was to be taken in the Plaint and substantiated by ocular or documentary evidence, as was advised. That has not happened in the present case. If it is so, it necessarily follows that the suit structure is different than the structure referred to in the Ejectment proceedings being Shed No.8.

6. It is seen from the record that the other evidence which has been pressed into service on

behalf of the Appellant makes no reference to the fact that the suit structure was in existence prior to 1st April 1962, inasmuch as neither the assessment receipt, rent receipt, sales-tax assessment and telephone bills make reference that the suit structure was in existence prior to 1961.

7. Suffice it to observe that the Appellant/Plaintiff has failed to prove that the suit structure was in existence prior to 1962. That finding of fact as has been recorded by the Trial Court, does not warrant any interference. If that finding is to be upheld, the conclusion reached by the Court below of dismissing the Suit, is a mere formality. Viewed in this perspective, there is no merits in this Appeal. The same is therefore dismissed.

8. At this stage, Counsel for the Appellant submits that even accepting the finding of fact reached by the Trial Court, which has been upheld by this Court as it is as per the extant policy of the Corporation, structures such as the present one, can be considered for regularisation. The

Appellant intends to make such application to the competent Authority for regularisation of the structure. Such application be made within three weeks from today and on receipt of the said application by the Executive Engineer, Building Proposal City, the same be decided within three weeks from the date of presentation after following necessary procedure.

9. Till such time, the Application for regularisation is not finally decided by the competent Authority, Respondent Corporation shall not take any precipitative action in respect of the suit structure. It will be open to the present landlord of the structure to file objections in regularisation proceedings, if so advised, which will have to be considered by the competent Authority in accordance with law.

10. If regularisation application is not made within three weeks from today, it will be open for the Corporation to proceed against the suit structure in accordance with law.

11. In view of the above order, cognate Civil Application also stands disposed of.

A.M.KHANWILKAR, J.